

No. 12785

In The
United States Court of Appeals
For the Ninth Circuit

FARMERS INSURANCE EXCHANGE, also known as
FARMERS AUTOMOBILE INTER INSURANCE
EXCHANGE, *Appellant*

v.

LOUISE K. HOLM, *Respondent*

PETITION FOR REHEARING

Upon Appeal From the United States District Court
For the District of Oregon

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TO THE HONORABLE JUDGES OF THE UNITED
STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT:

Comes now Appellant and petitions the Court for a
rehearing herein for the reasons here set forth.

I

Although the Court in its opinion filed herein on
August 6, 1951, states that "the only substantial" ques-
tion is the issue whether von Borstel's version of Law-
rence's statement estopped the Exchange from reliance
on the exclusions of the policy, nonetheless the opinion

reflects a misapprehension both of Appellant's argument and of applicable Oregon law.

(a) Appellant argued that the trial judge incorrectly determined plaintiff had proven all the elements laid down in Oregon cases as essential to an estoppel. This Court's opinion entirely disregards the absence of these elements required by the Oregon law of estoppel.

(b) Although the Court correctly notes that Oregon recognizes a distinction between waiver and estoppel, the opinion incorrectly assumes that Appellant's argument was based on a *lack of authority in Lawrence to waive* policy provisions. Appellant in fact argued that whether or not Lawrence had apparent authority to waive forfeiture (such authority not being conceded) was immaterial, since the actual issue was whether Lawrence could, *without express authority, extend the coverage* of the policy to risks which the contract itself excluded. This question, vital though it is, was disregarded by the Court.

(c) The effect of this misapprehension is clearly illustrated in the weight which the Court gives to the *Fagg* case.* In the *Fagg* case the Oregon court was deal-

* *Fagg v. Mass. Bonding & Ins. Co.*, 142 Ore. 358, 19 P. (2) 413.

ing with a waiver of a forfeiture by estoppel; in the instant case, the Court is dealing with an attempted extension of the policy coverage by estoppel. In the *Fagg* case a general agent expressly empowered to grant waivers did the acts which were held to estop the company to deny that the forfeiture had been waived; in the instant case the agent was one of limited authority. The *Fagg* decision is therefore not adverse to but entirely consistent with Appellant's position herein.

II

The trial court, in submitting to the jury the single question whether von Borstel's or Lawrence's version of their conversation was to be believed, restated for the jury only plaintiff's evidence on this question, and stated even that evidence with an incompleteness highly prejudicial to Appellant. This Court on appeal held that in so doing the trial court committed no reversible error. In so holding, the decision of this Court is squarely in conflict with recent and well-reasoned decisions of the Third, Fourth and Eighth Circuits, and with decisions of the Supreme Court on which the intermediate courts relied.

III

The Court applied erroneous principles of law in reaching its decision, for in matters of substance it has failed to follow Oregon law.

(a) Under Oregon law the rights of the parties to this action were fixed at the time of the accident, and nothing that happened thereafter could affect the existence or absence of an estoppel based on the von Borstel-Lawrence conversation. Nonetheless this Court, in reaching the conclusion that an estoppel did arise from that conversation, states that "it is of consequence" that certain matters happened after the accident.

(b) One of the reasons which the Court adduces to support its conclusion that an estoppel arose from the von Borstel-Lawrence conversation was that long subsequent thereto the Exchange "formally assumed responsibility for the accident under the state Financial Responsibility Act." Neither Oregon statutes nor Oregon case law attaches any such drastic consequences to the filing of a Form SR-21, irrespective of whether an issue of ratification or of estoppel is involved.

We submit that the Court should grant a rehearing in order that its opinion may be directed to the issues

present in the case and argued heretofore, and that its decision may be corrected to conform to the governing Oregon law and to the unanimous rulings of other Federal Courts.

Respectfully submitted,

KOERNER, YOUNG, McCOLLOCH
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I, Clarence J. Young, one of counsel for Appellant, hereby certify that in my judgment the foregoing petition is well founded and that it is not interposed for the purpose of delay.

CLARENCE J. YOUNG

